No. [redacted]. 58

In the Supreme Court of the United States

October Term, 1958

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Reasons for granting the writ	4
Conclusion	6
Appendix	7

CITATIONS

Cases:

International Brotherhood of Electrical Workers, Local 501 v. *National Labor Relations Board*, 341 U.S. 694	5
Marshall Field & Co. v. *National Labor Relations Board*, 318 U.S. 253	5
National Labor Relations Board v. *Brandman Iron Company*, 281 F. 2d 797, petition for certiorari pending, No. 646, this Term	2, 4, 5, 6
National Labor Relations Board v. *Cheney California Lumber Co.*, 327 U.S. 385	5
National Labor Relations Board v. *Dallas General Drivers, Warehousemen and Helpers Local No. 745*, 46 LRRM 3119	5
National Labor Relations Board v. *Las Vegas Sand & Gravel Corp.*, 283 F. 2d 26	4
National Labor Relations Board v. *Ochoa Fertilizer Corp.*, 283 F. 2d 26	4

Statute:

National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*):	
Section 8	3
Section 10	10

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL 476, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit entered on July 18, 1960, modifying an order issued by the Board against respondents.

OPINIONS BELOW

The opinion of the court of appeals enforcing the Board's order with modifications (*infra.* pp. 7–11) is reported at 280 F. 2d 441. The opinion denying the Board's petition for rehearing is reported at 283 F. 2d 26.[1] The findings of fact, conclusions of law, and

[1] The opinion on rehearing, a joint opinion disposing of seven cases, is printed in the appendix to the Board's petition for certiorari in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, No. —, this Term, which is being filed simultaneously with this petition.

order of the Board (R. 1–13, 19–21)[2] are reported at 124 NLRB 538.

JURISDICTION

The court of appeals entered its decree on July 18, 1960 (*infra*, p. 11–12) and denied the Board's petition for rehearing on October 18, 1960 (*infra*, p. 13). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether the court of appeals has power under Section 10(e) of the National Labor Relations Act to modify an order entered by the National Labor Relations Board, where the Board adopted the Trial Examiner's recommended order in the absence of exceptions thereto.

STATUTE INVOLVED

The relevant provisions of Section 10 of the National Labor Relations Act (61 Stat. 146, as amended, 29 U.S.C. 160) are set forth at pp. 14–15 of the Board's petition for certiorari in the companion case, *National Labor Relations Board* v. *Brandman Iron Co.*, No. 646, this Term.

STATEMENT

Following an unfair labor practice hearing, the Trial Examiner issued an intermediate report finding

[2] "R." refers to the printed appendix to petitioner's brief in the court of appeals.

that respondents had violated Section 8(b)(4)(A) of the Act by inducing and encouraging the employees of Cuddigan, a subcontractor, to engage in a concerted refusal to work on a construction project, in order to compel Cuddigan to cease doing business with Turgeon, the primary contractor (R. 1–12). The Examiner's recommended order required that respondents:

> 1. Cease and desist from engaging in, or inducing or encouraging the employes of [Cuddigan] *or any other employer* to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require [Cuddigan], *or any other employer or person* to cease doing business with [Turgeon]. [R. 11; emphasis added.]

Affirmatively, the recommended order required, *inter alia,* that respondents post notices of compliance with the cease and desist provision, including the italicized language (R. 11–13).

Respondents filed exceptions to "certain rulings and findings" of the Trial Examiner, but did not except to the terms of the cease and desist provision (R. 14–15). The Board accordingly entered an order (R. 19–21) adopting the recommended order of the Trial Examiner, including the references to "any other employer" quoted above.

The Board petitioned the court below for enforcement of its order. On July 18, 1960, the court issued an opinion and decree granting enforcement, but mod-

ifying the order by striking the references to any other employer (*infra*, pp. 11–12).[3] The Board filed a petition for rehearing, which was denied by the court in an opinion [4] and order (*infra*, p. 13) issued on October 18, 1960.

REASONS FOR GRANTING THE WRIT

1. This case presents the same issue as that involved in *National Labor Relations Board* v. *Brandman Iron Company*, 281 F. 2d 797 (C.A. 6), petition for certiorari pending, No. 646, this Term—*i.e.*, whether the court of appeals has power under the Act to modify provisions of a Board order which were not contested

[3] In adopting the Trial Examiner's proposed order, forbidding secondary pressure against Turgeon through Cuddigan "or any other employer" (*i.e.*, through any other *secondary* employer), the Board had also added a clause forbidding secondary pressure against "any other company or person" (*i.e.*, against any other *primary* employer) (R. 20), and that clause was also deleted by the court of appeals. While we believe that deletion was equally beyond the power of the court—since no exception had been taken to that clause before the Board—the Board made no objection to that modification in its petition for rehearing before the court of appeals, and we do not challenge it here.

[4] The court's opinion disposed of a total of seven cases, in three of which the Board is simultaneously filing petitions for certiorari: (1) *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*; (2) *National Labor Relations Board* v. *Las Vegas Sand and Gravel Corp.*; and (3) the instant case. The opinion is printed in the appendix to the petition in *Ochoa Fertilizer*.

before the Board.[5] As shown in the petition in *Brandman*, to which we respectfully refer the Court, the view of the court below is contrary to decisions of this Court and in conflict with those of other circuits. Moreover, the question presented is of importance in the administration of the Act.

2. Even if the court below had power to modify the uncontested provisions of the Board's order, its action in limiting the order to the particular secondary employer whose employees were induced by the union is contrary to settled authority. As this Court held in *International Brotherhood of Electrical Workers, Local 501* v. *National Labor Relations Board*, 341 U.S. 694, 705–706, "[t]o confine the order solely to secondary pressure through * * * [the secondary employer currently involved] would leave * * * [the primary employer] and other employers who do business with him exposed to the same type of pressure through comparable channels." See also, *National Labor Relations Board* v. *Dallas General Drivers, Warehousemen and Helpers Local Union No. 745*, 46 LRRM 3119 (C.A. 5), restoring a provision similar to that deleted by the court below, on the authority of *Electrical Workers*.

---

[5] As noted in the *Brandman* petition (p. 8, n. 7), no relevant distinction may be drawn from the fact that *Brandman* involves a consent settlement prior to hearing, and the instant case, the entry of an uncontested order following a hearing. Cf. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388–389; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255–256.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, or, in the alternative, held in abeyance pending the decision in *Brandman*.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
MARION L. GRIFFIN,
Attorney,
National Labor Relations Board.

JANUARY 1961.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5590.

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

LOCAL 476, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO AND ITS BUSINESS AGENT, WILLIAM O'BRIEN, RESPONDENTS.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

[124 N.L.R.B. No. 75].

Before WOODBURY, *Chief Judge,* and HARTIGAN and ALDRICH, *Circuit Judges.*

OPINION OF THE COURT.

July 18, 1960.

HARTIGAN, *Circuit Judge.* This is a petition for enforcement of an order of the National Labor Relations Board entered August 20, 1959 pursuant to the Board's decision, 124 N.L.R.B. No. 75, which found that respondent union, Local 476, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, and its business agent William O'Brien,

violated Section 8(b)(4)(A), 49 Stat. 452 (1947), 29 U.S.C. § 158(b)(4)(A) (1958).[1]

The Board found that the respondents violated this section of the Act by inducing and encouraging employees of Joseph P. Cuddigan, Inc., a subcontractor installing heating equipment, to engage in a concerted refusal to work with an object of compelling Cuddigan to cease doing business with E. Turgeon Construction Co., Inc., the general contractor. Respondents contend that the petition should be denied because (1) there is not substantial evidence in the record considered as a whole to support the Board's findings, and (2) that even if the record contains such substantial evidence the record does not warrant the broad order.

We are satisfied that the record viewed as a whole does contain substantial evidence to support the Board's findings. In the record there is testimony by George Alfred Turgeon, president of the E. Turgeon Construction Co., that William O'Brien, business agent of the union, Local 476, phoned him and asked him to put a steamfitter on the job of maintaining and operating the temporary heating system in the construction project. Turgeon testified he replied "no" and that O'Brien said he would have to take the steamfitters off the job. The testimony of Robert Skinner, Cuddigan's foreman on the project, and Douglas Brunt, a Cuddigan employee, was that O'Brien came to the project on the following Monday and told them that if they did not hear from him that they should lock the tool box and leave the job until he contacted them. Turgeon testified to a conversation with Skinner in which Skinner said he was following instructions and in response to a question said

[1] This section has been amended by Pub. L. 86-257, § 704a, 73 Stat. 542 (1959) but governs this case.

he supposed that the taking of Cuddigan's men off the job was on account of the temporary heating problem. The minutes of a meeting of the executive board of the union stated that the decision to walk off the Turgeon job was made to protect the jurisdiction of the steamfitters.

O'Brien testified that his purpose in visiting the project and in contacting Turgeon was to find out who was responsible for maintaining the temporary heat and that he was unable to discover who made the ruling depriving the union of jobs rightfully belonging to it. However, O'Brien admitted that his only interest in the temporary heat situation would be to have a steamfitter hired, and such was understood by Turgeon when O'Brien called him.

On the record viewed as a whole we conclude that there is substantial evidence to support the Board's finding of a violation of Section 8(b)(4)(A).

In regard to respondents' contention that the petition should be dismissed because the Board's order is too broad, we are of the opinion that there is not sufficient evidence in the record to support the issuance of the broad order. The order requires that respondents cease and desist from inducing or encouraging "employees of Joseph P. Cuddigan, Inc. *or of any other employer*" to engage in a strike or concerted refusal to work where an object thereof is to force "Joseph P. Cuddigan, Inc., *or any other employer or person* to cease doing business with E. Turgeon Construction Co. *or any other company or person*" and to post appropriate notices. (Italics ours). As we indicated in *National Labor Relations Board* v. *Bangor Building Trades Council, AFL–CIO, et al.*, Apr. 18, 1960 (1 Cir.), and in *National Labor Relations Board* v. *Local 111, United Brotherhood of Carpenters and Joiners etc. et al.*, decided by this court on May 24,

1960, enforcement of a broad order will be granted only where the record supports a conclusion of the necessity or appropriateness of such a broad order. *Communications Workers of America, AFL–CIO et al.* v. *N.L.R.B.*, 362 U.S. 479, 480, 481 (1960). See also *N.L.R.B.* v. *United Brotherhood of Carpenters*, 276 F. 2d 694 (7 Cir. 1960); *N.L.R.B.* v. *Local 926, Int. Union of Operating Eng. etc.*, 267 F. 2d 418 (5 Cir. 1959); *International Brotherhood of Team, etc.* v. *N.L.R.B.*, 262 F. 2d 456 (D.C. Cir. 1958).

In the instant case, neither the trial examiner nor the Board made any finding relating to the likelihood of similar violations by respondents. The only facts pointed out by counsel for the Board on this petition are that the respondent union had a collective bargaining agreement with an association of heating and piping contractors and that the union's decision was made to protect its jurisdiction. These facts alone do not sufficiently indicate that respondents will commit similar violations as to others in the future. Nor can reliance be placed on a past dispute as to employment of a steamfitter to maintain a temporary heating system which was mentioned in the record, since the settlement agreement specifically disclaims any admission by the union of a Section 8(b)(4)(A) violation. See *N.L.R.B.*v. *Local 926, Int. Union of Operating Eng., etc., supra.* This certainly cannot support a conclusion of a "proclivity for unlawful conduct." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949).

We do not agree with respondents' contention that the undue breadth of the order warrants dismissal of the petition. Section 10(e) of the Act, 29 U.S.C. § 160(e) (1958) empowers this court to modify an order on a petition for enforcement. We shall modify the broad order by striking the phrases "or

of any other employer", "or any other employer or person" and "or any other company or person" from the order and thus enter a decree enforcing the order as so modified.

A decree will be entered enforcing the order of the Board except to the extent inconsistent with this opinion.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5590.

NATIONAL LABOR RELATIONS BOARD, PETITIONER.

v.

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING ETC., ET AL., RESPONDENTS

DECREE.

July 18, 1960.

This cause came on to be heard upon the petition for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now, to wit, July 18, 1960, here ordered, adjudged and decreed as follows: The order of the National Labor Relations Board of August 20, 1959, as modified herein, and with the exception of paragraph 2(c), is hereby affirmed and enforced.

Paragraph 1 of said order and the notice appended to said order are each modified by striking therefrom the words "or of any other employer", "or any other employer or person" and "or any other company or person".

It is further ordered that the respondents herein notify the Regional Director for the First Region in

writing within fifteen (15) days of this Decree of the steps they have taken to comply with said order as herein modified, and affirmed and enforced.

By the Court:

/s/ ROGER A. STINCHFIELD,
Clerk.

A true copy:
Attest:

ROGER A. STINCHFIELD,
Clerk.

No. 5590

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

LOCAL 476, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO AND ITS BUSINESS AGENT, WILLIAM O'BRIEN.

ON PETITION FOR REHEARING

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

OPINION OF THE COURT

October 18, 1960.

[Omitted. Opinion printed in appendix to petition for certiorari in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, No. —, this Term.]

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5590.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL 476, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING ETC., ET AL., RESPONDENTS.

ORDER OF COURT.

October 18, 1960.

It is ordered that the Petition for Rehearing filed by petitioner on August 2, 1960, be, and the same hereby is, denied.

By the Court:

/s/ ROGER A. STINCHFIELD,
Clerk.

U. S. GOVERNMENT PRINTING OFFICE 1961